

9th December 2011

Manager
Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

By email: NFPReform@treasury.gov.au

Dear Sir/Madam,

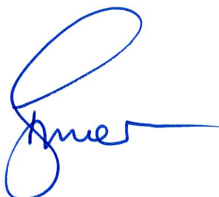
**Submission to Consultation Paper
A Definition of Charity**

The purpose of this letter is to respond to the consultation paper released in October 2011.

I enclose the submission from Australian Baptist Ministries and associated entities and look forward to participating in this discussion as it continues.

If I can be of any further assistance or any clarification is required please do not hesitate to contact me.

Yours faithfully
Australian Baptist Ministries



Trevor Spicer
National Treasurer



A Definition of Charity

Submission in response to Consultation Paper released 28 October 2011

Submitted on behalf of:

Australian Baptist Ministries

The Baptist Union of Victoria

Baptist Churches of Tasmania

Baptist Churches of South Australia

Baptist Churches of Western Australia

The Baptist Union of the Northern Territory

Contact: Mr Trevor Spicer
National Treasurer
Australian Baptist Ministries
597 Burwood Road
HAWTHORN VIC 3122.

Tel: (03) 9815-7121
Email: tspicer@globalinteraction.org.au

A Definition of Charity

This submission is in response to the Consultation Paper released by the Assistant Treasurer on 28th October 2011 titled “A Definition of Charity”.

Australian Baptist Ministries, State Baptist Unions their associated agencies and organisations and local Baptist churches welcome the opportunity to contribute to the discussion on this important issue by way of this submission and we look forward to the opportunity of continuing to interact with the Government as it further develops policies on these matters.

While Australian Baptist Ministries commend the Government in seeking to clarify the definition of ‘charity’ we are concerned that if the proposals contained in the consultation papers proceed they may in fact reduce clarity, could disadvantage religious organisations compared to other charities and will likely result in significant compliance costs across the religious sector within Australia.

Who we are

Australian Baptist Ministries is the trading name of The Baptist Union of Australia. The Baptist Union of Australia is a voluntary association of State Baptist Unions and is incorporated under the Australian Capital Territory Associations Incorporation Act 1991.

Australian Baptists are a multi-cultural and multi-generational movement of people serving communities in metropolitan, regional, coastal, rural and remote Australia through a network of approximately 1,000 churches with a regular combined regular attendance of around 150,000 people. At the 2006 census over 315,000 people listed their religious affiliation as Baptist.

Australian Baptist Ministries is a federated organisation, partnering with local churches through State Union organisations.

While some local Baptist Churches are incorporated entities most operate as separate unincorporated entities.

In many ways Australian Baptist Ministries would be seen by the community in general as the peak body of the Baptist movement in Australia.

While the Baptist ethos values the autonomy of the local congregation, there are many times, places and occasions where a national voice or opinion is sought from the various Christian denominations and other times and occasions where, in our view, a national statement on behalf of the Baptist movement in Australia can contribute significantly to the national debate or thinking.

What we do

Together with the State Baptist Unions, Australian Baptist Ministries is committed to:

- supporting and equipping local churches,
- training and equipping individuals for professional and lay ministry,
- supporting overseas missions,
- assisting the disadvantaged within our own communities and overseas.

There are a number of ministries that operate under the auspices of Australian Baptist Ministries to provide these many and varied opportunities to serve the public amongst the many communities in which our congregations and agencies operate.

These ministries include:

- Approximately 1,000 local Baptist congregations of varying sizes,
- State Baptist Unions in all states and territories of Australia,
- Baptist Care Australia and State Baptist Care organisations in each state,
- Global Interaction,
- Baptist World Aid Australia,
- Crossover Australia,
- Remote Churches Ministry,
- Baptist Financial Services,
- Australian Baptist Insurance Services.

Local Baptist Churches and many of the above organisations commenced and continue to exist through the generosity and foresight of Australian Baptists. In many cases they have been contributing through the generosity of members to the social fabric of Australian communities and in an International setting for well over 100 years.

While some of the above organisations operate solely within the Baptist community of churches, many of them have a far-reaching impact on Australian communities and each of them contributes to the public benefit of Australians and Australia. For example Baptist Care Australia encompasses 2,700 packaged community aged care places, over 4,400 residential aged care places, family services, refugee services, employment services, youth services, low cost housing, chaplaincy, counselling, disability and mental health services and other diverse programs to meet community need.

The international ministries listed above (Global Interaction and Baptist World Aid Australia) provide humanitarian, development, medical and educational support services and capacity building amongst some of the world's most disadvantaged people.

General Comments on the Consultation Paper

The concerns of Australian Baptist Ministries to matters raised in the consultation paper relate to the following issues:

- The proposed standardisation of the definition of 'not-for-profit' in the 'In Australia' special conditions,
- The replacement of 'dominant' with 'exclusive' in relation to charitable purposes and activities,
- The removal of the presumption of public benefit for religious organisations,
- Lack of clarity in the administration by the ACNC of the public benefit test,
- Lack of clarity in transitional arrangements and requirements for existing charities.

Definition of not-for-profit

In section 2.1.1, the Consultation Paper, *A Definition of Charity* states

“Under the common law meaning of charity, a charity must be a not-for-profit entity”

According to our reading of the consultation paper there is no proposed change to this assertion.

However, the consultation paper, specifically in paragraph 50 states

“The Statutory definition of charity will use the same meaning of not-for-profit as developed by this separate consultation process. The not-for-profit definition applies to all NFP’s not just charities and is therefore being considered as part of a broader consultation process.

Given that this process of consultation is continuing and no further Exposure Draft has been released since the 'In Australia' Exposure Draft of 4 July 2011, it is difficult for Australian Baptist Ministries to do other than re-iterate our comments regarding the proposed definition of not-for-profit contained in that exposure draft, namely:

In the context of the many reviews and inquiries into the Charitable sector the definition of non-profit, charitable and not-for-profit has been re-visited a number of times.

The additional clarification contained in subsection 995-1(1) **not-for profit entity** means an entity that:

(b) does not distribute its profits or assets to particular entities, including its owners or members, either while it is operating or upon winding up.

This differs considerably to the requirements that the ATO currently makes of not-for-profit entities:

The assets and income of the organisation shall be applied solely in furtherance of its above-mentioned objects and no portion shall be distributed directly or indirectly to the members of the organisation except as bona fide compensation for services rendered or expense incurred on behalf of the organisation.

As with most large charitable movements, the Baptist movement in Australia is structured via a number of discrete entities. We are concerned that if this definition was adopted and compliance was a condition of endorsement, Baptist entities would be prevented from distributing to other Baptist entities.

Our understanding of the law as it stands allows a charity to distribute to another charity without infringing the requirement to be not-for-profit as per the current requirements. This proposed definition, if adopted, would reverse this position.

Further, in our view this sub-clause uses the ambiguous term “particular entities”, which is not defined in the statute or common law.

Within the Baptist community of churches, it is common for property to be held “in trust” by one of our State Unions (or by a designated Property Trust) for the beneficial use of a local church. In the event of the closure of a particular local church and the sale of real property that is owned, the proceeds of that sale are often held for the use of future congregations yet to commence. In some cases when a new congregation commences, a starting grant, gift or distribution is made from these funds realised from previous property sales. Our view is that, under the proposed draft legislation, this would negatively impact the Income Tax Exemption of the State Union or Property Trust despite the funds being used for the charitable uses of the organisation. This proposed definition, if adopted, would prevent the distribution of such funds between Baptist charitable entities.

There are also income tax exempt Baptist entities within Australia that make donations to other income tax exempt Baptist entities in pursuit of their main object; the advancement of religion. This proposed definition of not-for-profit entities, if adopted, would prevent the distribution of such funds between Baptist entities even if in pursuit of this charitable purpose.

Furthermore, if the Baptist entity making the donation or distribution is deemed a commercial operation, this proposed definition, in our view, is at odds with the recently distributed *Better targeting of Not-for-Profit tax concessions* Consultation paper as it broadens the limitation of distributions. The model for commercial operations under the proposal raised in the consultation paper requires 100% distribution of surpluses in order that income tax is not payable. Under this proposed definition, in our view, it is difficult to know to whom these distributions can be made in view of the proposed and undefined limitation around distribution to ‘particular entities’.

Responses to Consultation questions

Question 1. Dominant or exclusively charitable purpose

In our view the Charities Bill 2003 section 6 that deals with the issue of **dominant purpose** should be left unchanged. That is a charity should need only to have a dominant purpose that is charitable rather than the purpose(s) be exclusively charitable.

While it is true that paragraph 54 recognises that *“any other purposes, which if viewed in isolation, would not be charitable, could only be incidental or ancillary to the charitable purpose”* it should also be noted that decisions made by the ACNC regarding whether or not activities or purposes are ‘ancillary’ or ‘incidental’ will by nature be subjective and could lead either to controversy, appeal or legal challenge.

Question 2. Peak Bodies

Australian Baptist Ministries endorse the proposal contained in the Consultation paper that the 2003 decision of the NSW Administrative Decisions Tribunal provides clarification of the charitable status of peak bodies provide they *“enhance the long term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution”*.

Question 3. Sufficient section of the general community

In our view the need for an entity to meet the statutory definition of charity must demonstrate that a purpose is for the benefit of a ‘sufficient section of the general community’ infers that it will be directed towards a numerically large group of people. We believe that further clarity is needed regarding this issue particularly for smaller religious groups that, whilst their services are all provided for the general public, can also be seen by some as not providing these services for the public benefit. Again, in our view, decisions made regarding this issue will be subjective and open to appeal or controversy.

Question 4. Family Ties

Australian Baptist Ministries believe the Charities Bill 2003 should be clarified in this respect to definitely allow beneficiaries with family ties to be able to receive benefits from charities in particular circumstances.

Questions 5 & 6. Public Benefit

Australian Baptist Ministries agree that the term ‘for the public benefit’ needs to be clarified subject to our response regarding the removal of ‘presumption of public benefit. We believe that, in this area ruling TR 2011/D2 and the final ruling TR 2011/4 provide sufficient certainty. We are extremely concerned however at the proposed exclusion of the presumption of public benefit for the first three heads of charity.

Question 7. Demonstration of public benefit

We believe there is no case made in the Consultation Paper that the current system to determine 'public benefit' has not operated effectively. Nor is there any detailed and impartial evidence of the overseas examples working well without significant compliance costs to charitable organisations.

There is mention made of the administrative difficulty and the cost to government in regulating and enforcing the law (paragraph 79) however paragraph 83 states "Altering the presumption of public benefit may not increase compliance costs for most charities".

In our view there would likely be significant costs, particularly to religious organisations, where the demonstration of public benefit is not currently essential given the presumption of public benefit in the advancement of religion.

The demonstration of public benefit is again an exceedingly subjective determination and one which, in our view, could lead the ACNC into significant conflict with the sector.

If there are concerns regarding 'renegade' religious organisations, we submit that resourcing the investigation and prosecution of these instances would be preferable to assuming 'mischief' on the part of all religious organisations.

Question 8. Role of the ACNC

In our view the ACNC should provide clear guidance regarding the criteria used to determine 'public benefit'. This will reduce ambiguity, conflict and the likelihood of appeals.

The information provided in England and Wales is relatively clear but would, as noted in the paper, require modification for Australian circumstances.

Question 9. Removal of presumption of benefit

Australian Baptist Ministries is concerned that the 'community concern' noted in paragraph 89 in respect of the 2010 Senate Inquiry 'about the activities of some religious groups' seems to be driving this change to remove the presumption of public benefit.

We are not best placed to judge this for the whole sector, but can speak for the Baptist movement in Australia in saying that there has never been any suggestion that any affiliated entity has knowingly engaged in such activities.

We recommend that if this is a concern for the Government, the appropriate response is to use the existing criminal laws or make changes to such laws to deter and penalise criminal behaviour.

In our view, the concerns raised by several religious entities regarding significantly increased administrative costs that would be incurred are correct.

This would particularly be the case if each of the 1,000 local Baptist congregations and other Baptist entities in Australia were required to demonstrate public benefit individually.

Should the presumption of public benefit be overturned, peak bodies such as Australian Baptist Ministries should be able to play a role in individual congregations or entities meeting the public benefit test.

We are not comforted by the suggestion that the overturning of the presumption of public benefit for the advancement of religion has not resulted in 'any particular difficulties for most religions'. There is no data or evidence contained in the consultation paper to support this proposition.

Question 11. Role of activities

As with our response to consultation question 1, we believe that the definition for activities should refer only to the 'dominant purpose'. In our view this will provide more certainty regarding the role of activities of a charity and whether they are provided in the furtherance of this 'dominant purpose'.

Questions 12 & 13. Political Advocacy and political activity

In our view the area of government regulation of political activities is a vexed issue for government. If there is over-regulation, government is seen as a quasi 'censor' of what commentary may be made by organisations, often representing the most vulnerable in our society or the views of their members on the role of government and on social policy.

We support the England, Wales and Scotland treatment of advocacy as noted in Appendix B to the Consultation paper.

Question 16. List of Charitable purposes

In our view the lists of charitable purposes contained in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 are appropriate lists of charitable purposes. In a democratic society like Australia there will most likely always be those advocating for further additions to such a list.

Question 18. Harmonisation of Commonwealth, State & Territory laws

Australian Baptist Ministries believe that while the longer-term goal of harmonising a definition of charity across various levels of government is laudable it should not restrain or further delay the various reviews and potential changes in the not-for-profit and charitable sector. We believe that to try harmonise all areas noted in paragraph 138 of the Consultation paper, whilst an excellent goal and eventually necessary, will delay the current reviews which, in our view, have in themselves led to a significant burden on the not-for-profit and charitable sector in responding to various reviews within relatively short period of time.

We are concerned that the longer these reviews continue, the greater this burden will become and this will inevitably impact financially on charities and possibly in terms of service delivery to the vulnerable amongst whom so many charities work.

Question 20. Transitional issues

Australian Baptist Ministries believe that the transitional issues surrounding the implementation of a statutory definition of charity as noted in the consultation paper are too vague and ill-defined.

In a sector that is only now growing accustomed to dealing with government and such regulations we believe there needs to be significant guidance provided by the ACNC to charities during a transitional period so that every opportunity is given for bona-fide charities to comply with the requirements for registration as a charity. As such we believe that formal reviews of charities to determine endorsement should not begin until at least 1 July 2014.

Conclusion

While Australian Baptist Ministries commend the Government in seeking to clarify the definition of 'charity' we are concerned that if the proposals contained in the consultation papers proceed 'as in' they may in fact reduce clarity, would disadvantage religious organisations compared to other charities and will likely result in significant compliance costs across the religious sector within Australia.

Recommendations

- (a) In our view the definition of charity relies on an as yet undecided definition of not-for-profit which will be further discussed in the second release of the 'In Australia' Exposure Draft. Therefore the process of this consultation regarding the provision of a statutory definition of charity should be suspended until progress is made and agreed regarding the definition of 'not-for-profit'.
- (b) In our view the Charities Bill 2003 section 6 should be left unchanged regarding the issue of dominant purpose.
- (c) We endorse the proposal regarding the clarification of the charitable status of peak bodies.
- (d) We believe further clarity needs to be given to the following:
- a. "sufficient section of the general community",
 - b. "for the public benefit",
 - c. The role of activities,
 - d. Transitional issues".
- (e) In our view the current system to determine 'public benefit' should be retained as there is insufficient evidence provided that it has not worked effectively.
- (f) In our view if our recommendation (e) above is not followed, then the role of the ACNC needs to include giving clear guidance regarding the criteria they will use to determine 'public benefit' well in advance of the tests taking place.
- (g) In our view the proposal to remove the presumption of benefit of religious organisations is based on the perceived mischief of a few and the presumption of benefit should not be removed. This removal would also incur very significant administrative costs for all major faith based denominations particularly if each entity was required to prove 'public benefit' on an individual basis.
- (h) In our view the attempt to completely harmonise all related legislation from federal, state and territory legislatures will delay unnecessarily this and other current consultations within the not-for-profit and charitable sector. This will lead to a continuation of the administrative burden and increase the current high level of uncertainty within the sector.
